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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Petition of Mpower Communications Corp. for
Establishment of New Flexible Contract
Mechanism Not Subject to "Pick and Choose"

CC Docket No. _____

PETITION FOR FORBEARANCE AND RULEMAKING

MPOWER COMMUNICATIONS CORP.

Russell I. Zuckerman
Senior Vice President & General Counsel
Francis D. R. Coleman
Vice President, Regulatory Affairs
Richard E. Heatter
Vice President, Legal Affairs
Marilyn H. Ash
Counsel – Legal & Regulatory Affairs
175 Sully's Trail – Suite 300
Pittsford, NY 14534
(716) 218-6568 (tel)
(716) 218-0165 (fax)

May 25, 2001

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Summary

Mpower proposes a new flexible contract mechanism, which would be in addition to the UNE “safety net.” This mechanism, which Mpower calls “FLEX contracts,” would encourage ILECs and CLECs to negotiate wholesale “package deals” involving a broad range of business interests but especially provisioning, quality of service, and volume and term discounts. Any similarly situated CLEC could opt in on a fair and non-discriminatory basis. These FLEX contracts would not be subject to “pick and choose.”

Mpower requests that for FLEX contracts, the FCC: (1) forbear from application or enforcement of Section 252(i) re “pick and choose;” 2) forbear from application or enforcement of Section 252(e) re submission of FLEX contracts to state commissions for approval or enforcement; and (3) institute a rulemaking to establish a federal program for notification, opt-in, and enforcement of FLEX contracts.

FLEX contracts are needed for several reasons: (1) To facilitate ILEC/CLEC wholesale relationships. (2) To encourage innovation by providing incentives to develop more efficient business relationships. (3) To provide a reasonable, deliberate step toward more effective competition, which both ILECs and CLECs may support. (4) To provide a moderate transition step toward increased de-regulation.

The FCC has the authority under Section 10 [47 U.S.C. 160] to forbear from the application and enforcement of rules or provisions when their application is not necessary to protect the parties or the public. Section 706 of the 1996 Act says the FCC “shall encourage” the deployment of advanced telecommunications services. Mpower believes FLEX contracts will promote competition for advanced services.

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PETITION OF MPOWER COMMUNICATIONS CORP.

Mpower Communications Corp. ("Mpower") hereby submits this Petition for Forbearance and Rulemaking requesting that the Commission establish a new flexible contract mechanism not subject to "pick and choose." We refer to this mechanism as "FLEX contracts."

I. Introduction

Mpower believes it is time to "add an arrow to the quiver" of ILECs and CLECs who want to make competition work. Competition could work far better if ILECs had more incentive to develop their wholesale markets and to view CLECs as good business partners, rather than merely as a regulatory burden. Together ILECs and CLECs can roll out new services faster and provide customers with the choices they need.

To achieve these goals, Mpower requests that the FCC: (1) forbear from application or enforcement of Section 252(i) "pick and choose" requirements to FLEX contracts; (2) forbear from application or enforcement of provisions of Section 252(e) that might require FLEX contracts to be submitted to state commissions for approval and

that would permit states to enforce FLEX contracts; and (3) institute a rulemaking to establish a federal program for notification, opt-in, and enforcement of FLEX contracts.

II. Vision

As Mpower has argued in various comments filed with the FCC, CLECs need access to ILEC networks regardless of the technologies incorporated in them.¹ ILECs own the vast majority of the telecommunications network in this country and to operate effectively – or often, to operate at all – CLECs need the use of ILEC networks.

ILECs, on the other hand, need wholesale customers to help them fill these existing and new "pipes" and to keep service levels to customers high. As competition begins to flourish, certainly it would be foolish to neglect this avenue for telecommunications revenues and ILECs increasingly have come to realize this. In fact, according to various sources, including ILEC annual reports, wholesale business is already beginning to boom.²

Add to this combination the perceived threat to ILECs from "outside," which is created by cable companies or other broadband companies not a part of the traditional telecommunications network, who are working feverishly to take data customers from telecommunications companies and the need for creative new tools to advance competition becomes all the more apparent.

¹ Comments of Mpower Communications Corp. on the remand of the Collocation Order, 10/12/00, pp. 47-48; Comments of Mpower Communications Corp. on line sharing, 2/27/01, p. 2; Reply Comments of Mpower Communications Corp. on line sharing, 3/13/01, p. 3. Note that Mpower has emphasized the necessity of "end-to-end" UNEs but has affirmatively stated that ILECs should be able to deploy their chosen network architectures and technologies on their own schedules. Further, much of the dispute about network access has involved collocation in remote terminals, which Mpower believes is unlikely to be economically viable.

² Better Connections, News and Information for our Competitive Local Exchange Carrier Customers, Winter 2000, BellSouth, at 3. See also Business Wire, BellSouth Commits to Wholesale Services Market Initiative, Feb. 19, 2001, available at <http://news.excite.com/news/bw/010219/ga-bellsouth>; Qwest Communications Announces Landmark Initiative to Open Local Communications Markets, September 19, 2000, http://qwest.com/about/media/pressroom/1,1720,328_archive,00.html.

While CLECs still need UNEs as a “safety net,” good business dictates cooperation and not “war” with one's suppliers or customers. CLECs need quality and timely performance at reasonable rates. Mpower and other CLECs might well enter into wholesale contracts with ILECs or other suppliers willing and able to provide such service on reasonable terms and conditions – just as one does in areas of the economy which are more competitive and less regulated. As noted, Mpower refers to these wholesale agreements as “FLEX Contracts.”

A. What Would the World of FLEX Contracts Look Like?

First, one needs to visualize the world as it has existed under the provisions of the 1996 Act. The Act required ILECs to offer interconnection, collocation and UNEs, among other things. There have been continuing disputes over the absolute bare minimum the ILECs are required to offer. Once initial requirements were established, ILECs began the process of offering, provisioning and pricing these products. Provisioning, in particular, is something no one initially knew how to do and in general, ILECs were not motivated to make it work. CLECs, although often the ILECs' biggest customers, were viewed more as competitors than as customers.

Mpower expects the world of FLEX contracts to look very different.³ They are predicated upon the view that ILECs actually want CLECs as wholesale customers and that they will seek to provide products and services to CLECs that CLECs want and that they will do so on terms and conditions that are mutually beneficial. Mpower would expect many of these FLEX contracts to look much like typical, wholesale contracts for long distance services or even typical, retail-type contracts for wireless services. In other

³ At least until that expectation proves true, however, CLECs have a need for a UNE “safety net.”

words, they would contain provisions which are "a package deal," and include terms and conditions for bulk purchases and concomitant quality of service guaranties.

If, as Mpower believes, a burgeoning demand exists for creative wholesale services, FLEX contracts will facilitate the satisfaction of that demand and thus enhance competition.

B. How Can One Distinguish Between Interconnection Agreements and FLEX Contracts?

Because UNEs are required by the Act and because they are intended to "jump start" competition where little or none has existed, they are predicated upon the proposition that any CLEC can come in and "buy one off the shelf." They have, in fact, many "retail" characteristics. While they do require the existence of an interconnection agreement, one buys them one at a time, at whatever speed and in whatever quantities one wishes. Ordering and provisioning are likewise done one at a time and pricing typically is based on this ability to buy one unit at a time. Should quality of services measures - usually called performance measures - exist, the "parity" required by the Act is measured by the ILEC retail performance for comparable services. Thus, Mpower would characterize an interconnection agreement as a retail-type arrangement based upon the minimum requirements of the Act.

A FLEX contract, on the other hand, can be viewed as a purely voluntary, wholesale arrangement negotiated or developed to meet the needs and desires of the contracting parties. As noted above, in form, they might look very much like the "package deals" currently offered in more competitive areas of telecommunications. In content, Mpower would expect them to contain creative combinations of provisions for

quantity, quality, term and price, as well as new product and service offerings to enhance business and to attract wholesale customers. In addition, FLEX contracts would be distinguished from other agreements between ILECs and CLECs in that the parties would specifically agree that the contract be treated as a FLEX contract and subject to the forbearances and rules requested in this petition.

III. Characteristics of Request

Mpower requests that in addition to the existing regulatory mechanisms developed in compliance with the 1996 Act that the FCC approve a new flexible contract mechanism, as described below.

Although the telecommunications industry is still – and still needs to be – a regulated industry, if competition is to proceed apace, increasingly market-driven business principles must apply rather than mere regulatory requirements. Thus, ILECs and CLECs should be free to negotiate “package deals” – not subject to “pick and choose” - involving a broad range of business interests, but especially provisioning, quality of service, volume and term discounts and other fundamental terms affecting the business relationship of the parties.

Such contracts should be available for any similarly situated CLEC to opt into on a fair and non-discriminatory basis. They should only be allowed to opt into the entire agreement, however, rather than be able to pick just “the best parts” of the deal. Hence, we ask that these contracts not be subject to “pick and choose.” This limited forbearance, however, would in no way affect the existing statutory and regulatory system but would

only add one new tool⁴ to facilitate the development of competition and the growth of wholesale markets for telecommunications services.

Why are such agreements needed? As the FCC is well aware, arguments were originally made that “pick and choose” would inhibit innovative deal-making.⁵ In fact, that seems to have occurred. Although “pick and choose” has existed for several years for interconnection agreements, interconnection agreements are increasingly standardized. From the standpoint of putting large numbers of contracts in place in a relatively short period of time, standardization is probably the most effective approach. From the standpoint of innovative and effective contracting, however, the scene is reminiscent of the Gobi Desert. There is a great sameness and very little meaningful choice. The ability to innovate and the incentive to do so are sorely needed.

Arguably, it is also “time for a change,” albeit by a reasonable, deliberate step toward a less regulated telecommunications market rather than the sudden de-regulation sought by some ILECs both in Congress, e.g. the Tauzin bill, and at the FCC, e.g. the petition of SBC, BellSouth and Verizon for immediate de-regulation of high capacity loops and transport.

A great deal of time, effort, thought and investment have gone into developing the regulatory environment required by the 1996 Act. This effort should not be wasted by precipitous de-regulation. Such extreme action would lead only to a combination of

⁴ Both the impair standard and the FLEX contract are viewed as tools to facilitate competition. The impair standard, however, is mandatory and applies to all UNE transactions, whereas the FLEX contract would be voluntary and limited to the contracting parties. The FLEX contract would facilitate a more gradual transition to competition as opposed to the “all or nothing” characteristic of a mandatory standard.

⁵ Local Competition First Report and Order, CC Dockets 96-98 & 95-185, para. 1303 (Rel. 8/8/96) (“Local Competition Order”)

“regulatory shock” and the ultimate re-monopolization of the telecommunications industry.

In Mpower’s view, however, the telecommunications industry is at a critical juncture. ILECs are restless in the face of growing cable and wireless sales. CLECs are struggling to survive in the face of devastatingly poor capital markets. This seems to result at least in part from Wall Street’s lack of confidence in the regulatory “cold war” between ILECs and CLECs over UNEs and their provisioning.

The industry needs to find an effective way to move network deployments and competition forward to enhance the economy and meet the needs of consumers. Providing encouragement to and removing disincentives for ILECs to become good wholesale partners with CLECs may be the most effective means to that end and “FLEX contracts” would seem to be a potent tool in achieving that goal. Certainly, it would be a “win-win-win” solution because it would be good for ILECs, good for CLECs and good for their customers.

IV. Authority

A. Authority Under §10 [47 U.S.C. 160]

As the Commission is certainly aware, Section 10 encourages the Commission to forbear from applying any regulation or provision of the Communications Act of 1934 – in fact it says the Commission “shall” forbear – when:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations...are just and reasonable and are not unjustly or unreasonably discriminatory;

- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

Section 10(b) goes on to say that in judging the public interest, the Commission shall:

“consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”⁶

That, of course, is exactly the reason Mpower is asking for the Commission’s forbearance from “pick and choose” on the new, wholesale tool that Mpower calls “FLEX contracts.” Also, since this new tool would be superimposed upon and would be an addition to the UNE system provided for under the 1996 Act, all FLEX contract agreements would be truly voluntary agreements between ILECs and CLECs.

Thus, the terms and prices would be market-based and by definition, “just and reasonable” under the circumstances. Since Mpower proposes that any similarly situated CLEC be able to “opt into” these agreements, they would also be free from unjust and unreasonable discrimination. Because their purpose and effect should be to increase the wholesale market for telecommunications services and to enhance competition among providers of telecommunications services, Mpower believes they would benefit consumers and be in the public interest.

The FCC has just decided on regulatory forbearance on tariffing for non-dominant carriers to continue to “move to market-based solutions by encouraging CLECs to negotiate rates outside of the tariff safe harbor where they see fit.”⁷ Likewise, FLEX contracts are intended to encourage ILECs and CLECs to negotiate outside of the UNE framework where it is good business to do so.

B. Scope of Authority

The Commission concluded in the Local Competition Order, at para. 1309, that national standards to implement section 252(i) and a uniform legal interpretation of the Act's requirements would assist carriers in determining their obligations and promote competition. Specifically, the Commission said regarding "pick and choose" that: "issues such as whether 252(i) allows requesting telecommunications carriers to choose among provisions of prior interconnection agreements or requires them to accept an entire agreement are issues of law that should not vary from state to state."⁸

Thus, as the Commission previously found, any decision on "pick and choose" should be a national policy, not subject to varying decisions by the states. Likewise, if the FCC grants Mpower's petition and adopts forbearance from "pick and choose" for "FLEX contracts" as a new competitive tool, that decision should also be a national standard which is not subject to differing interpretations in the states. Also, this would be the only policy consistent with Section 10(e) [47 U.S.C. 160(e)], which states that: "A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a) [quoted in IV.

⁶ According to the U.S. Court of Appeals for the D.C. Circuit, the FCC has even broader authority under this section than to "forbear from enforcing" the provisions of Section 10. *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 764 (D.C. Cir. 2000). According to the Court, the FCC may also "forbear from applying" the provisions of Section 10.

⁷ *Access Charge Reform Seventh Report and Order*, CC Docket 96-262, para. 5 (Rel. 4/27/01).

⁸ *Local Competition Order* at para 1309

A, above]." Clearly, any other policy would significantly undercut the effectiveness of "FLEX contracts," could cause substantial delay in implementation and could unfairly deny carriers in some states the anticipated benefits to competition.

C. Other Support/Section 706

Under Section 706 of the 1996 Act, the FCC is strongly urged to promote - in fact, the statute says it "shall encourage" - the deployment of advanced telecommunications services. Advanced telecommunications services are defined, as follows:

"[W]ithout regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications."

Mpower would argue that most new telecommunications services could meet this definition because new and evolving technology increasingly consists of high speed, packetized transport of both voice and data.

Access to this new technology, no matter where it occurs in the telecommunications network, is absolutely vital to competition and to CLECs. It is vital to competition because new and innovative services use the new technology. Consequently, this is where competition both for better products and for new customers will occur. It is vital to CLECs because increasingly they will need access to this new technology to provide their services and to reach their customers.

Section 706(a) specifically charges the FCC to use "regulatory forbearance, measures that promote competition...or other regulating methods that remove barriers to infrastructure investment" to encourage the deployment of new services. This is also the

intent of FLEX contracts. FLEX contracts are intended to encourage ILECs and CLECs to cooperate in making competitive products and services more widely available by utilizing more of the ILECs' vast network capacity and by using that network more effectively and efficiently.

V. Issues

A. Negotiated Contracts and 251

The 1996 Act provides at 47 U.S.C. 252(a)(1) for agreements arrived at through voluntary negotiations. While that section refers to a "request for interconnection, services, or network elements pursuant to section 251," it provides that the ILEC and CLEC may enter into a binding agreement "without regard to the standards set forth in subsections (b) and (c) of section 251." Those sections set out the obligations of all local exchange carriers, as well as the additional obligations of ILECs with regard to interconnection, UNEs, resale and collocation. Such an agreement, however, must provide a detailed schedule of itemized charges for interconnection and for each service or network element and it must be submitted for approval of the appropriate state commission.

In the case of FLEX contracts, Mpower proposes that such contracts not be submitted to any commission for approval and that the FCC establish a program for enforcement of FLEX contracts. To accomplish this result, Mpower requests, in addition to forbearance from the "pick and choose" requirements of Section 252(i) of the Act, that the Commission forbear from application of Section 252(e), in its entirety, to FLEX contracts. Thus, FLEX contracts would not be submitted to state commissions for approval, and states would not enforce these contracts or supervise the process of opting-

in to them. Instead, the FCC would enforce these contracts including CLECs' rights to opt into them in their entirety.

The Commission would not generally need to become involved with FLEX contracts unless enforcement became necessary. Mpower suggests that FLEX contracts be subject to enforcement by means of a special "Rocket Docket" procedure, made available specifically for that purpose. Mpower requests that the Commission initiate a rulemaking to establish this federal program for enforcement of FLEX contracts.

Mpower stresses that there would be no need for FCC approval of such contracts. Mpower does not believe that it would be necessary for parties to file FLEX contracts with the Commission. Instead, the FCC could require that ILECs post FLEX contracts on their websites.

B. "Poison Pills"

In a less than fully competitive market, there is always the potential for anti-competitive behavior. In the context of bi-lateral contracts, where only an "opt-in" of the entire agreement is possible, there is always a concern about the possibility of a "poison pill" provision which would make it inappropriate, uneconomic or otherwise unavailable because of an intentionally limiting provision. Mpower believes there are at least three reasons why this should not be a significant concern regarding its proposed FLEX contracts.

First, UNEs, and all other requirements of the 1996 Act, would still be available to CLECs so there would be no incentive for CLECs to adopt such an agreement if the terms were not beneficial, *i.e.* with FLEX contracts, CLECs would still have a "safety net."

Second, with a voluntary wholesale agreement which is good business for both the ILEC and the CLEC, there should be an incentive on the part of the ILEC, at least, to make the agreement attractive to other CLECs as well. Such agreements would help to "fill the pipeline" of the ILECs with CLEC business. Mpower has summarized this approach as "retail, wholesale or no sale," meaning that the ILEC can provide retail services, it can provide wholesale services or it can lose out on one or both of those sources of revenue. Certainly, ILECs would have no incentive to impede good wholesale business deals.

Third, these agreements would be subject to an anti-discrimination provision, specifically, that they be available to all similarly situated CLECs able to meet the contract terms. It is, however, issues like these that will benefit most from comments in a rulemaking.


C. Prejudice

FLEX contracts could potentially deal with any mutually beneficial terms, conditions and prices which are non-discriminatory. There is a concern that even with a waiver of "pick and choose," however, that the agreement (or portions of the agreement) could be used against one or both of the parties in another forum, such as in state UNE pricing dockets. FLEX contracts must be available as the next reasonable step to enhance competition and to reduce regulation. That may not happen if elements of the contracts can be taken out of context, separated from the "give and take" involved in their negotiation and used against the parties. Consequently, Mpower asks the FCC to rule that such contracts are not admissible in any unrelated proceeding.

VI. Conclusions

Mpower, thus, requests that the Commission initiate an expedited rulemaking for purposes of approving Mpower's proposed "FLEX contract" as the next reasonable step toward improved wholesale relationships between ILECs and CLECs and toward increased and more effective competition in the telecommunications marketplace. Further, Mpower asks that the Commission forbear from applying "pick and choose" to this new tool, which Mpower requests be in addition to and no way in substitution for the current regulatory system.

Respectfully submitted,

By  ^{17b}

Russell I. Zuckerman
Senior Vice President

& General Counsel

Francis D. R. Coleman

Vice President, Regulatory Affairs

Richard E. Heatter

Vice President, Legal Affairs

Marilyn H. Ash

Counsel – Legal & Regulatory
Affairs

175 Sully's Trail – Suite 300

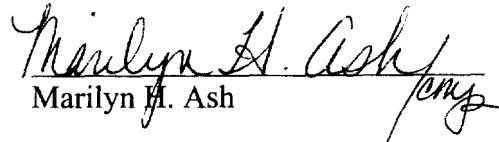
Pittsford, NY 14534

(716) 218-6568 (tel)

(716) 218-0165 (fax)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Forbearance and Rulemaking of Mpower Communications Corp. have been served by hand delivery to the persons on the attached list.


Marilyn H. Ash

Date: May 25, 2001

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commissions
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

VIA HAND DELIVERY

Susan Ness, Commissioner
Federal Communications Commission
445 12th Street, S.W.
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Samuel Feder
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Jordan Goldstein
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Sarah Whitesell
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Dorothy Atwood
Chief, Enforcement Division
Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W. - Suite 5A848
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Harold Furchtgott-Roth, Commissioner
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Michael K. Powell, Commissioner
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Kyle Dixon
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Gloria Tristani, Commissioner
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Michelle Carey
Chief, Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W. - The Portals
Washington, DC 20554

VIA HAND DELIVERY

Brent Olsen
Deputy Chief
Policy and Program Planning Division
Federal Communications Commission
445 12th Street, S.W. - The Portals
Washington, DC 20554

VIA HAND DELIVERY

Glen Reynolds
Associate Bureau Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W. - The Portals
Washington, D.C. 20554

VIA HAND DELIVERY

Kathy Farroba
Deputy Chief
Policy and Program Planning Division
Federal Communications Commission
445 12th Street, S.W. - The Portals
Washington, DC 20554

VIA HAND DELIVERY

Jessica Rosenwerfel
Policy and Program Planning Division
Federal Communications Commission
445 12th Street, S.W. - The Portals
Washington, DC 20554

VIA HAND DELIVERY

ITS Inc.
The Portals - 445 12th Street, SW
Washington, DC